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Issue date: 20Nov2001

In the Matters of

**ADMINISTRATOR, WAGE AND
HOUR DIVISION,**

Prosecuting Party

v.

**MOHAN KUTTY, M.D. d/b/a THE CENTER
FOR INTERNAL MEDICINE AND
PEDIATRICS, INC., et al.,**

Respondents

**Case Nos.: 2001-LCA-00010
2001-LCA-00011
2001-LCA-00012
2001-LCA-00013
2001-LCA-00014
2001-LCA-00015
2001-LCA-00016
2001-LCA-00017
2001-LCA-00018
2001-LCA-00019
2001-LCA-00020
2001-LCA-00021
2001-LCA-00022
2001-LCA-00023
2001-LCA-00024
2001-LCA-00025**

**ORDER GRANTING PERMISSION TO RESPONDENTS' COUNSEL TO WITHDRAW
AS COUNSEL; RE-SCHEDULING THE CONTINUATION OF HEARING TO
DECEMBER 4, 2001; AND REQUIRING RESPONDENTS TO APPEAR OR SHOW
CAUSE WHY THEY OR THEIR REPRESENTATIVES CANNOT APPEAR FOR
HEARING ON DECEMBER 4, 2001**

This matter is before me on the Notice of Intent to Withdraw as Respondents' Counsel filed by the law firm of Montpelier & Young, P.A., on October 17, 2001.

Hearing commenced in this case on June 4, 2001. On June 28, 2001, the hearing was recessed, to resume on Monday, November 26, 2001.¹ On October 17, 2001, counsel for the Respondents filed their notice of intent to withdraw as counsel as of October 22, 2001. Counsel for the Prosecuting Party (the "Administrator") responded, characterizing the notice as a "request" and objecting to the withdrawal because no reason was given, and withdrawal would cause disruption, prejudice and further delay in disposition of the case. Counsel for Respondents replied that their notice was not a request, that the applicable rules do not require permission of the court for them to withdraw, and that the reason for withdrawal could not be disclosed because it would violate attorney-client privilege. The Administrator responded that permission is indeed

¹The long recess was necessary because of the imminent maternity leave of Respondents' counsel.

required. On October 25, 2001, I issued an Order to Show Cause finding that absent an appearance from substitute counsel, my permission is required for counsel to withdraw and ordering counsel to show cause why they should be permitted to withdraw. Counsel for Respondents then offered to submit materials under seal for *in camera* review, and moved to postpone the schedule pending resolution of the issue of their withdrawal. The Administrator objected to both requests. On November 9, 2001, I issued an Order granting the request to file their reasons under seal, but denying the motion to postpone the schedule. Thereafter counsel for Respondents filed their response to the show cause order giving a reason for withdrawing supported by an affidavit and other supporting documentation. On November 16, 2001, I held a telephone conference with counsel for the Administrator and counsel for Respondents. Katherine Young spoke on behalf of counsel for the Respondents; Dale Montpelier was also on the line. Donna Sonner participated on behalf of the Administrator. The conference was tape recorded. Copies of the tape will be provided to the participants as soon as they become available, and a copy will be maintained as part of the record in this case.

At the outset of the telephone conference I stated that I had reviewed the information in support of withdrawal and concluded, based in part on *United States v. Haddad*, 527 F.2d 537 (6th Cir. 1975) and *Kalyawongsa v. Moffett*, 105 F.3d 283 (6th Cir. 1997), that the reason for withdrawal, that Respondents have not paid their bill or replenished their retainer, is not privileged. The materials filed in support of the request for withdrawal will therefore become part of the record in this case and will not be maintained under seal. I also noted the potential consequences to Respondents if counsel are allowed to withdraw, including dismissal of the requests for hearing for abandonment or default for failure to appear at hearing pursuant to 29 CFR §§ 18.39(b) and 18.5(b). I stated that the corporate Respondents cannot appear at hearing without being represented by counsel. I then gave an opportunity for counsel to present their positions regarding withdrawal of Respondents' counsel.

During the course of her presentation, Ms. Young indicated that her firm had discussed in detail the reasons for and consequences of withdrawing with representatives of the Respondents. She indicated that in addition to the failure to pay issue, there are also issues of the level of cooperation of Respondents with counsel's attempts to prepare for the resumption of hearing, and the ability of the Respondents to pay for further representation. Dr. Mohan Kutty has been out of the country, and although he was expected to return by November 13, 2001, he has not yet returned. In addition, all of the Tennessee clinics operated by Dr. Kutty or the corporate Respondents have closed due to financial distress. She was uncertain whether there would be funds available from either business or personal assets of any of the Respondents. She requested that the firm be allowed to withdraw and the Respondents be given time to retain alternate counsel.

Counsel for the Administrator stated that the reasons for objecting to withdrawal had been explained in her briefs. She pointed out that the case for the Administrator is substantially complete, counsel have been actively preparing to complete their case, arrangements have been made for the remaining witnesses to appear in accordance with the schedule previously set, and

Respondents would be given undue advantage by further delays. She expressed concern that if the schedule is not maintained, completion of the case would be uncertain as it appears that the Respondents will be unable to retain new counsel even if given additional time. During discussion of re-scheduling the hearing, Ms. Sonner indicated that she would move for default as to all Respondents if they fail to appear at hearing.

Being duly advised, I hereby confirm my findings made verbally during the telephone conference. Respondents have had notice since June 28, 2001, that hearing would resume from November 26 to December 7, 2001, and since at least since October 17, 2001, that their counsel intended to withdraw. Under the circumstances as they currently exist, and balancing the rights and equities among the parties and their counsel, I find that Montpelier and Young, P.A., should be and hereby are given permission to withdraw as counsel for the Respondents. I further find that the hearing now set for November 26 should be postponed briefly to give Respondents an opportunity to obtain new counsel or to show cause why they or their representatives cannot appear at the hearing. **Hearing in this matter will resume on Tuesday, December 4, 2001, at 9:30 a.m., at Courtroom 1B, United States Bankruptcy Court, 800 Main Street, Knoxville, Tennessee. If the Respondents do not appear at the hearing or show cause on or before 9:30 a.m., December 4, 2001, why they should be excused from appearing at the hearing, Respondents' requests for hearing may be subject to dismissal or default by reason of abandonment. Corporate Respondents are hereby notified that they must be represented by counsel to appear at the hearing.**

SO ORDERED.

ALICE M. CRAFT
Administrative Law Judge